

## The State of South Carolina



## Office of the Attorney General

Opinion No 87-55  
Pg 14T. TRAVIS MEDLOCK  
ATTORNEY GENERALREMBERT C. DENNIS BUILDING  
POST OFFICE BOX 11549  
COLUMBIA, S.C. 29211  
TELEPHONE 803-734-3970

June 3, 1987

The Honorable Thomas E. Smith, Jr.  
Chairman, Joint Legislative Judicial  
Screening Committee  
402 Gressette Building  
Columbia, South Carolina 29202

Dear Senator Smith:

By your letter of May 20, 1987, you have referred to the announcement by Chief Justice Ness that he would step down from the Supreme Court on February 26, 1988. You have asked the following question:

Assuming that the Judicial Screening Committee can conduct the screening process for the successor to Chief Justice Ness during October and November and assuming Justice Gregory is without opposition for the position and is found qualified, can the Screening Committee then immediately begin to screen a successor for Justice Gregory?

You have indicated that this procedure, if found to be appropriate, would enable the Legislature to elect Justice Gregory to Chief Justice and his successor at the same time. In a related question, you have also asked when a vacancy would be considered to occur: at the time a judge or justice submits his resignation, or upon the effective date of the resignation.

Act No. 119, 1975 Acts and Joint Resolutions, codified as Section 2-19-10 et seq., Code of Laws of South Carolina (1976), provides the procedure for the joint screening committee to be appointed, investigations to be initiated, and hearings on qualifications of candidates to be held. The committee is composed of four members of the Senate and four members of the House of Representatives; you are presently serving as chairman. Membership on the screening committee is on a continuing basis; a new committee is not appointed each time an election by the General Assembly in Joint Session is anticipated.

The Honorable Thomas E. Smith, Jr.  
Page 2  
June 3, 1987

Section 2-19-20 of the Code provides in pertinent part:

Any person wishing to seek an office, which is elected by the General Assembly, shall file a notice of intention to seek the office with the joint committee. Upon receipt of such notice of intention, the joint committee shall begin to conduct such investigation of the candidate as it deems appropriate . . . .

Section 2-19-30 of the Code provides that "[u]pon completion of the investigation, the chairman of the joint committee shall schedule a public hearing concerning the qualifications of the candidates." Certain deadlines are specified as to when the hearing must be scheduled vis a vis the date of election, when written statements must be furnished, and so forth. Nowhere within Act No. 119 of 1975 (Sections 2-19-10 through 2-19-60 of the Code) appears any prohibition that would prevent the screening of a candidate to fill an anticipated vacancy prior to completion of the election process of an individual to fill a known vacancy. Thus, if the Legislature or Joint Screening Committee so desire, Act No. 119 of 1975 apparently would not prohibit the actions contemplated by your letter as described above.<sup>1/</sup>

An examination of past practices in screening prospective candidates and subsequent elections reveals that one vacancy has been filled by election prior to beginning the process to select a successor. For example, the Honorable Julius B. Ness was screened by the committee on January 31, 1985 prior to his election on February 20, 1985, to the position of Chief Justice being vacated by the Honorable Bruce Littlejohn. To fill the office of Associate Justice being vacated by Justice Ness, the Honorable Ernest Finney was screened on March 7, 1985 prior to his election on April 3, 1985. Upon his election, Justice Finney vacated his judgeship in the Third Judicial Circuit; the Honorable David McInnis was screened on April 11, 1985 prior to his election on May 1, 1985 to fill the vacancy in the Third Circuit. Other progressions of judicial elections occasioned by retirement or elevation of the incumbent judges revealed similar

---

<sup>1/</sup> We note that, in the usual case, elections by the General Assembly to fill vacancies in the judiciary are on a prospective basis. As long as such a vacancy is certain to occur within the time which the General Assembly as then constituted will have authority to fill it, such a prospective election is permissible. State ex rel. Eberle v. Clark, 87 Conn. 537, 89 A. 172 (1913); 63A Am.Jur.2d Public Officers and Employees § 135.

The Honorable Thomas E. Smith, Jr.  
Page 3  
June 3, 1987

circumstances of screening and election to fill one vacancy before initiating the process to fill a vacancy occasioned by an individual's election to another office.

It could be argued that the General Assembly has interpreted its statutes as so requiring one election to be completed prior to filling a vacancy necessitated by the election of the incumbent thereof to a different position in the first election. Nothing within Act No. 119 of 1975 requires such an interpretation, and the General Assembly certainly would be free to modify its procedures in this regard, taking into account such considerations as economic use of time and other resources, continuity of the judicial system, convenience to all parties, and other relevant factors. If the General Assembly and the Joint Legislative Judicial Screening Committee so desired, screening for a successor to Justice Gregory could begin as outlined in your letter and above, considering the various stated assumptions which, of course, must first occur.

Your final question concerned the determination of when a vacancy actually occurs: on the date a prospective resignation is tendered, or upon the effective date of the resignation. An office is deemed to be vacant "whenever it is not occupied by a legally qualified incumbent who has the lawful right to continue in the office until the happening of some future event." 63A Am.Jur.2d Public Officers and Employees § 138. The incumbent officer would continue to hold office until the effective date of his resignation; the vacancy would not occur until that time, though the resignation was announced prospectively.

We trust that we have satisfactorily responded to your inquiry. Please advise if we may provide clarification or additional assistance.

With kindest regards, I am

Sincerely,

*Patricia D. Petway*

Patricia D. Petway  
Assistant Attorney General

PDP/an

REVIEWED AND APPROVED BY:

*Robert D. Cook*

Robert D. Cook  
Executive Assistant for Opinions